Supreme Court, U.S.
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No. 00-373

IN THE

Supreme Court of the United States

COMMANDER OIL CORP.,

Petitioner,

v.

BARLO EQUIPMENT CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent Barlo Equipment Corporation ("Barlo") has no corporate parent and no publicly held company holds ten percent or more of its stock.

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REASONS FOR DENYING THE WRIT

The Court of Appeals for the Second Circuit concluded that "under the circumstances of this case," including particularly the specific lease terms, Pet. 3a, Barlo, the lessee of property as to which petitioner and titleholder Commander Oil Corp. ("Commander Oil") had "retained many of the rights and obligations of ownership," Pet. 20a, was not liable as an "owner" within the meaning of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA" or "Superfund"), 42 U.S.C. § 9607(a)(1). This determination was correct because the record clearly established that Barlo had no involvement with nor control over the site activity which led to the contamination, eliminating any basis to treat it as the site "owner."

Because the rationale for the Court of Appeals' rejection of lessee/sublessor status as a basis for CERCLA "owner" liability here was fact-driven, it does not present a square conflict with other decisional authority. Moreover, unlike the situation before this Court in *United States v. Bestfoods*, 524 U.S. 51 (1998), the issue has not arisen in a large number of instances.

In any event, the rejection of site control as a basis for "owner" rather than "operator" liability under CERCLA is consistent with the analysis in *Bestfoods*.

NEITHER THE RECORD BELOW NOR THE COURT OF APPEALS' DECISION WARRANTS REVIEW BY THIS COURT.

A. Barlo properly was held not liable because as a matter of fact it neither controlled nor conducted any polluting activity at the site.

Critical aspects of the relevant lease relationships have been omitted from the Petition's recital of the facts. Barlo leased office space in 1964 in a small building located on a plot of land in Uniondale, New York, identified as Nassau County Section 44, Block D, Lot 7A. Barlo used the space for its business of selling and distributing equipment. Lot 7A was adjacent to Lot 7B (the "Site"). The Site housed twelve above-ground petroleum storage tanks and had been used for decades by Commander Oil or its predecessors for the loading, unloading and storage of fuel oil.

In 1969, Commander Oil leased the Site to Pasley Solvents and Chemicals, Inc. ("Pasley"). Pasley used the Site to repackage, store and dispose of solvents which were CERCLA hazardous substances. Commander Oil retained, *inter alia*, the right to use and in fact kept using the Site's three large vertical tanks holding 225,000 gallons of fuel oil.

In 1972, Commander Oil dictated a change in its lease arrangements with Pasley and Barlo. Commander Oil consolidated the leases. It leased both lots to Barlo in one contract, insisting that the Site, which Barlo had never used, be subleased to Pasley, so as to allow Pasley to continue to occupy and use Lot 7B. Accordingly, Barlo's 1972 five-year lease was expanded to include the Site,

expressly acknowledged Pasley's existing tenancy of the Site, and effectively foreclosed subleasing of the Site to anyone but Pasley by otherwise banning a lease to any fuel, fuel oil or oil business — the businesses most likely to have use for such a tank farm.

Barlo's first knowledge of any environmental problem at the Site did not come until fully 12 years after Commander Oil leased it to Pasley. Following earlier discovery of contamination on the Site, the United States Environmental Protection Agency ("EPA") in 1987 ordered Commander Oil to conduct a CERCLA Remedial Investigation and Feasibility Study of the Site to determine the extent of contamination and to develop a plan for remediation. In 1990, Commander Oil, having entered into a consent decree with the EPA under which it agreed to design and implement response actions and to reimburse the federal government for its past costs, demanded contribution or indemnification from Barlo and Pasley, among others, by commencing this lawsuit.

At trial, the District Court determined that the actions of Pasley and its principal Robert Pasley were the primary cause of the contamination and that they were "wholly responsible for introducing the contaminants to the Site," Pet. 86a. It also found Commander Oil had contributed, although less significantly, to the contamination, Pet. 31a. Critically, the District Court rejected operator liability for Barlo, specifically stating, "[w]ith respect to Barlo, the record is *barren of any evidence* to suggest that it actually contributed to the contamination of the Site," Pet. 86a (emphasis supplied). The Second Circuit agreed, *see* Pet. 21a, n.3.

The 1972 Commander Oil-Barlo agreement was a plain vanilla lease, largely written on a standard form, but which gave Barlo fewer and more limited rights than a lessee normally would have. The Court of Appeals enumerated the significant limitations on Barlo's bundle of rights:

> Barlo was, *inter alia*, (1) limited to using Lot 7A [not the Site], and only "for that business presently conducted by tenant on a portion of the same premises leased hereunder"; (2) required to obtain written consent from Commander Oil before making "any additions, alterations or improvements" on the land, which alterations would become Commander Oil's property in any event; (3) required to obtain written approval from Commander Oil to sublet the property, and prohibited from subletting to any entity that had "any connection with the fuel, fuel oil or oil business"; (4) required to obtain written permission from Commander Oil to display any "sign, advertisement, notice or other lettering" on the building; (5) required to keep the property "clean and in order to the satisfaction of" Commander Oil, and responsible for any damage Barlo itself caused to the premises or to the "systems or equipment or any installation therein"; and (6) prohibited from doing anything that would "in any way increase the rate of fire insurance" on the property, and from bringing or keeping upon the premises "any inflammable, combustible or explosive fluid, chemical or substance."

Pet. 19a-20a.

The Second Circuit observed that at the same time:

> Commander Oil retained many of the rights and obligations of ownership. Among other things, the fuel company: (1) reserved a right to enter onto the lot for various purposes; (2) reserved for its own use three oil storage tanks on lot 7B; (3) reserved an "option" to use, on written notice to Barlo, "certain office space" within lot 7A; (4) reserved the right to maintain "its aerial or a compatible aerial" on the roof of the building, and (6) [sic] assumed responsibility to make structural repairs.

Pet. 20a. The Court of Appeals, noting that "Barlo lacked most of the bundle of rights that comes with ownership of property," Pet. 21a, correctly concluded: "Whether or not Barlo was simply a rent conduit between Commander Oil and Pasley — as Barlo claims — it did not possess sufficient attributes of ownership over lot 7B [the Site]." Pet. 19a. On the record before it, the conclusion reached by the Court of Appeals that Barlo was not *de facto* the Site's owner was correct.

B. The rationale of the decision below presents no issue of general significance warranting review by this Court.

Contrary to Petitioner's suggestion, the Court of Appeals did not fashion a strict and categorical rule that lessees/ sublessors could never be liable as owners. Rather, the Court of Appeals observed that if control over the facility were made the sole gauge of ownership under CERCLA — the position urged by Commander Oil — then operator liability

would be transformed into a subset of owner liability. Since statutes should be interpreted to avoid redundancy, the Second Circuit held that site control *alone* is an improper basis for the imposition of "owner" liability. Therefore, it reasoned, a typical lessee should not be held liable as an owner unless its lease arrangement contained specific rights and responsibilities which rendered it a "*de facto* owner." On analysis, no facts supporting a finding of *de facto* ownership, as suggested by the Court in its opinion,[1] existed in Barlo's situation, Pet. 18a-21a.

But even were the Court to find the legal theory urged in Commander Oil's Petition persuasive, given the record below and the Second Circuit's holding that lessee liability as an "owner" is dependent on the specific facts of the case, review of this case would afford no opportunity for its application. Barlo lacked sufficient rights under its particular lease to be deemed a *de facto* owner or to control the Site.

Moreover, unlike the situation which existed before the grant of certiorari in *United States v. Bestfoods*, 524 U.S. 1 (1998), the construction of "owner" in a lessee/sublessor context is neither a frequently recurring issue nor one as to which the Courts of Appeal are in conflict.[2]

1. The Second Circuit's opinion expressly sets forth certain factors which might be considered: (1) the length of the lease and whether the owner retains rights as to how the property may be used; (2) whether the lease may be terminated by the owner; (3) whether the lessee has the right to sublet all or any part of the property without notifying the owner; (4) whether the owner or lessee is responsible for taxes and other costs; and (5) whether the lessee is responsible for making structural and other repairs, Pet. 18a.

2. This Court also recently denied certiorari on a *Bestfoods* issue, *Browning-Ferris Industries of Illinois, Inc. v. Ter Maat*, 195 F.3d 953 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 1832 (2000).

Commander Oil's Petition cites a handful of District Court decisions and two appellate court decisions rendered over a period of 15 years to suggest the existence of disagreement in the law. Neither Court of Appeals decision suggests even the slightest conflict with the Second Circuit's decision.[3] Furthermore, the District Court cases are easily distinguishable on their facts — as, for example, *Servco Pacific Inc. v. Dods*, No. 98-00272, 2000 WL 1048586 (D. Haw. July 12, 2000), where a *50-year* lease was involved. That decision cites the Second Circuit's discussion of circumstances not present in Barlo's case, such as the long duration of the lease, which might support treating a lessee as an owner, further underscoring that the opinion below did not conclusively foreclose owner liability for all lessees in all situations.

In the District Court decision in *United States v. South Carolina Recycling and Disposal, Inc.*, 653 F. Supp. 984 (D.S.C. 1985), *aff'd in part, vacated in part sub nom. United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989), the actions of the lessee entity in question had entwined it utterly in the CERCLA liability scheme. The District Court found it liable under every possible CERCLA category — operator, arranger and transporter as well as owner. Because the lessee entity was so inextricably involved in operating the site, the District Court observed that it "stood in the shoes of the property owners," 653 F. Supp. at 1003. The lessee entity did not

3. *Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir.), *cert. denied*, 506 U.S. 940 (1992), involved operator liability and was specifically disapproved by *Bestfoods*, 524 U.S. at 60 n.8. The Fourth Circuit decision in *United States v. Monsanto Co.*, 858 F.2d 160 (6th Cir. 1988), *cert denied*, 490 U.S. 1106 (1989), never addressed the owner issue.

appeal the lower court's decision nor did the Fourth Circuit's opinion discuss the "owner" issue.

The Second Circuit did not dispute that a party so enmeshed in the contaminating conduct should be held liable under the particular circumstances. Rather, its opinion observed expressly that "if the lessee is the active user and polluter of the property, imposition of CERCLA liability [as an operator] seems particularly appropriate," Pet. 12a. It cautioned, however, that "imposing *owner* liability instead of *operator* liability threatens to conflate two statutorily distinct categories of potentially responsible parties," Pet. 13a (emphasis in original), and suggested factors to be considered in avoiding this pitfall.

Similarly, in *United States v. A & N Cleaners and Launderers, Inc.*, 788 F. Supp. 1317 (S.D.N.Y. 1992), a bank had exercised responsibility for maintenance and repair of the property in issue, had made repairs related to the cause of contamination, had an officer specifically responsible for environmental matters and had conducted an environmental investigation of the property, *id.* at 1333. By contrast, Barlo had no involvement with Pasley's daily Site operations nor did it inspect or maintain Pasley's facilities.

In *Burlington Northern Railroad Co. v. Woods Industries, Inc.*, 815 F. Supp. 1384, 1391 (E.D. Wash. 1993), where "arranger" liability also was found, the lessee had in fact exercised "control over the use of the property" by ordering the demolition of a building containing pesticides and conducting fruit-washing operations which also produced pesticide contaminants. In *Louisiana v. Braselman Corp.*, 78 F. Supp. 2d 543 (E.D. La. 1999), a direct government cost recovery action, the successor railroad was held liable

because its predecessor not only had leased but also had built the creosote works which contaminated the bayou. Additionally, the railroad was found to be a CERCLA facility owner by virtue of its ownership of tracks and other tangible property under a series of trackage indentures lasting up to 70 years.

Finally, in *Delaney v. Town of Carmel*, 55 F. Supp. 2d 237, 259 (S.D.N.Y. 1999), "owner" liability was rejected because the town, like Barlo, "had no involvement with the Site's day-to-day management." In short, none of these decisions can be said to be in real conflict with the Second Circuit's decision.

C. The decision below is consistent with *Bestfoods* and review is not required to reconcile the law.

The result reached by the Court of Appeals was consistent with this Court's *Bestfoods* decision. Indeed, the Second Circuit expressly adopted the interpretive approach of *Bestfoods*, Pet. 10a, and the result below is true to the reasoning of *Bestfoods*.[4]

Bestfoods focused the inquiry in the "operator" context on the factual relationship between the pollution and the

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4. It is somewhat surprising that Commander Oil now presents *Bestfoods* as central to its Petition. In the District Court, Commander Oil urged and the District Court concluded that Barlo's reliance on *Bestfoods* was "misplaced: that case concerned the question of liability in the parent-subsidiary context whereas the instant case concerns the question of liability in the landlord-tenant and owner-operator context," Pet. 27a. Similarly, in the Court of Appeals, Commander Oil characterized Barlo's reliance on *Bestfoods* as "fallaciousness."

parent entity, rejecting the notion that the parent's control of a subsidiary, without more, warranted liability. The Second Circuit focused the inquiry in the "owner" context on the relational nexus between the actual owner and the lessee, rejecting the argument that nominal status as a sublessor, without more, warranted liability. Commander Oil does not claim that any of Barlo's conduct caused the pollution; instead, it argues that Barlo should be held responsible because it did not act. The significance of the inaction can have meaning only in the context of Barlo's lease rights. Here, where its rights were severely limited, halting well short of *de facto* ownership, such inaction had no meaning.

The Petition is an invitation to read into a complex statute a form of status liability concededly not provided for on its face. There is no confusion which has been engendered by the Second Circuit's decision, nor does the decision undermine the rigor of CERCLA's liability scheme. Lessees who truly stand in the shoes of the owner cannot expect to escape CERCLA responsibility. In the instant case, an owner and operator (Commander Oil) and two operators and transporters (Pasley and Robert Pasley) were held liable, while a party found to have made no contribution to the contamination and which did not stand in the shoes of the owner (Barlo) was held not liable. The critical lesson likely to be drawn by courts and practitioners from the Second Circuit's decision is only that the specific nature of the relationship between a title owner and lessee must be examined carefully when evaluating a claim of "owner" liability under CERCLA.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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